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In the Supreme Court of the United States

OCTOBER TERM 1953

No. 321

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court denying the motion for a new trial (R. 116 ff.) is reported in 92 F. Supp. 750, (1950). The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court (R. 2204 ff.) is reported in 194 F. (2d) 80 (1952). The Petition for rehearing and rehearing en banc was denied by the United States Court of Appeals for the Ninth Circuit (R. 2226 ff.). The

opinion of the United States Court of Appeals for the Ninth Circuit denying Petitioner's application to vacate the denial of its Petition for rehearing and to reinstate the Petition (R. 2300 ff.) is reported in 198 F. (2d) 790. Petitioner's initial Petition to the United States Supreme Court for Writ of Certiorari was denied, 243 U.S. 941, (1952). On rehearing the order denying certiorari was vacated and the Petition for Writ of Certiorari was granted, 245 U.S. 932. Pursuant to the mandate of the United States Supreme Court vacating the order of the Court of Appeals denying Appellant's Petition for rehearing en banc, the petition for rehearing en banc was again considered by the United States Court of Appeals for the Ninth Circuit and was denied (R. 2328 ff.); the opinions are not yet reported.

JURISDICTION

On rehearing the United States Supreme Court granted Petitioner's Petition for Writ of Certiorari, and thereupon issued its mandate remanding the case to the United States Court of Appeals for the Ninth Circuit for further proceedings in the light of the opinion of the U. S. Supreme Court in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, No. 150 and 160, October Term, 1952, 345 U.S. 247. Pursuant to the mandate of the Supreme Court the United States Court of Appeals for the Ninth Circuit considered Appellant's Petition for rehearing en banc and thereupon denied the same (R. 2328 ff.).

A second petition for Write of Certiorari in this case was filed by Petitioner, and the jurisdiction of this court is envoked under Title 28 U.S.C.A. Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED

In its petition for writ of certiorari petitioner attempts to raise three questions for consideration by this court. Of these questions, only the third could possibly be before this court on this petition:

1. Whether the trial court correctly conceived its function and performed its duty in denying petitioner's motion for a new trial, which action by the trial court was approved by the court of appeals. (Petitioner's question No. 1, Petition for Writ of Certiorari, Page 4).

2. Whether the jury was motivated by passion or prejudice, and that thereby an excessive verdict resulted, contrary to the determination of the trial judge and the court of appeals. (Petitioner's questions Nos. 2, 3, 4, and 5, Petition for Writ of Certiorari, Page 4).

3. Whether the United States Court of Appeals for the Ninth Circuit properly complied with the mandate of this court issued pursuant to its decision on the first Writ of Certiorari. (Questions Nos. 6 and 7, Petition for Writ of Certiorari, Page 5.)

STATEMENT OF THE CASE

Petitioner's first petition to this court for a writ of certiorari was denied, 343 U.S. 941. On rehearing this

court vacated its order denying certiorari and granted the petition for writ of certiorari. Thereafter, upon consideration of Appellant's petition this court remanded the cause to the United States Court of Appeals for the Ninth Circuit and vacated that court's order denying the petition for rehearing en banc. The Court of Appeals was directed by the mandate to entertain further proceedings with respect to Appellant's petition for rehearing en banc, in the light of the opinion of this court in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, No. 150 and 160, October term, 1953, decided April 6, 1953, 345 U.S. 247.

Pursuant to the instructions of this court as set forth in the Western Pacific case, the Court of Appeals promulgated Amended Rule 23, providing that petitions for rehearing en banc should be determined by the panel of the court as constituted in the original hearing.

Acting under the authority of Rule 23 the Court of Appeals, by the original panel, reconsidered the petition of Appellant for rehearing en banc and denied the same. (R. 2328ff.)

The statement of the facts out of which this litigation arose is set forth in Respondent's brief in opposition to the first Appellant's petition for writ of certiorari, case No. 648. It is unnecessary to repeat this statement here for the purpose of considering this second petition for writ of certiorari, inasmuch as the questions there raised are not before this court on Appellant's second petition for certiorari.

REASONS FOR DENYING THE WRIT

(A) THIS PROCEEDING IS LIMITED TO MATTERS SUBSEQUENT TO THE ISSUANCE OF THE MANDATE.

The first five questions which petitioner attempts to present to this court in this its second petition for writ of certiorari, as set forth therein on page 4, assert purported errors in the trial of this case in the District Court. The trial of this "aged litigation"[1] was conducted more than four years ago. These exact questions have on four separate occasions been considered by the Court of Appeals for the Ninth Circuit, on the original appeal, on
the petition for rehearing en banc, on the motion to vacate the denial of the petition for rehearing, and on the second consideration of the petition for rehearing en banc pursuant to the mandate of this court.

These exact questions were presented to this court on petitioner's first petition for writ of certiorari, which petition was originally denied. On rehearing this court vacated the denial and granted the petition for writ of certiorari. At that point this court then had before it the petition for writ of certiorari in toto, and all the questions and issues set forth in the petition were then before the court for its consideration. This court thereupon vacated the order of the Court of Ap-

[1] Dissenting opinion of Justice Jackson in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, 345 U.S. 247.

peals denying the petition for rehearing en banc and remanded the case for further proceedings in the light of the opinion in the Western Pacific case. The mandate was limited to that sole question, and therefore if the Court of Appeals complied with the mandate it is the settled law of this court that other issues before the court in the original proceedings will not again be considered. These alleged errors of the trial court will not a second time be reviewed by this court. All that this court will concern itself with are proceedings subsequent to the mandate, to determine if the Court of Appeals properly complied therewith.

In Corning v. The Troy Iron and Nail Factory, 56 U. S. 451, 14 L. Ed. 768, (1853), this court said:

> "It is plain, therefore, that under the guise of an appeal from the decree of the Circuit Court, this is an appeal, in fact, from the decision of this court. For there is no other decree existing in the case except the decree of this court. There must be an end of litigation sometime. To allow a second appeal to the court of last resort, on the same questions which were open to dispute on the first, would lead to endless litigation.
>
> "A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But on an appeal from the mandate, it is well settled, that nothing is before the court but the proceedings subsequent to the mandate. Whatever was for-

merly before the court, and was disposed of by its decree, is considered as finally disposed of."

This principle was again affirmed in Stewart v. Salamon, 7 Otto 361, 24 L. Ed. 1044, (1878), wherein it was stated:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. This is not intended to interfere with any remedy the parties may have by mandamus.

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject-matter of the suit were finally determined upon the original appeal, and all that remained for the circuit court to do was to enter a decree in accordance with

> our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate."

This court ruled in Texas & P. R. Co. v. Anderson, 149 U.S. 237, 37 L. Ed. 717, (1893) that where a point could have been raised by appellant in the Supreme Court and was not, the decree of the trial court issued in accordance with the mandate was final and a second appeal could not raise such an issue. In the case at bar all questions were raised, and were before this court for its determination.

The reasons for this rule are clearly expounded in Roberts v. Cooper, 20 How. 467, 15 L. Ed. 969, (1857), wherein this court stated:

> "On the last trial, the Circuit Court was requested to give instructions to the jury, contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings

up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

This rule early established by this court has been consistently followed without deviation.

Cook v. Burnley's Exrs., 11 Wall. 672, 20 L. Ed. 84, (1870)

Illinois ex rel. Hunt v. Illinois C. R. Co., 184 U. S. 77, 46 L. Ed. 440, (1901)

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Aspen Mining & Smelting Co., v. Billings, 150 U. S. 31, 37 L. Ed. 986, (1893)

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United States v. Camou, 184 U. S. 572, 46 L. Ed. 694, (1902)

Pearce v. Germania Ins. Co., 6 Otto, 461, 24 L. Ed. 672, (1878)

Therefore any alleged errors in the trial of this case have not only been repeatedly passed upon and disallowed by the Court of Appeals but were squarely before this court when the original petition for writ of certiorari was granted. This court then had for its determination all of these issues. The only mandate which this court issued was the instruction to the Court of Appeals to reconsider the petition for rehearing en banc. Under the long established doctrine of this court as propounded in the foregoing cases a second petition for writ of certiorari will not again resurrect these long buried issues.

(B) THE COURT OF APPEALS HAS FULLY COMPLIED WITH THE MANDATE OF THIS COURT.

This court, on April 13, 1953, entered the following order:

> "PER CURIAM: The petition for rehearing is granted. The order entered May 5, 1952, denying

certiorari is vacated and the petition for writ of certiorari is granted. The order of the division of the Court of Appeals denying petition for rehearing en banc is vacated and the case is remanded to the Court of Appeals for further proceedings in the light of Western Pacific Railroad Corporation v. Western Pacific Railroad Company, Nos. 150 and 160, decided April 6, 1953."

Thereafter, pursuant to the mandate of this court and Rule 23, as amended, of the Court of Appeals covering en banc rehearings, providing that such petitions for rehearing shall be addressed to and determined by the court as constituted in the original hearing, the Appellant's petition for rehearing en banc was directed to the division of the court as constituted on the original appeal. In its per curiam opinion filed June 24, 1953, the Court of Appeals stated:

"Pursuant to the decision of the Supreme Court of April 13, 1953, and this court's Rule 23, as amended, appellant's petition for rehearing *en banc has been considered by this court* as constituted in the original hearing, and this court as so constituted being of the opinion that the case *should not be heard en banc or otherwise*, it is now ordered by this court as so constituted that the petition be and is hereby denied."
(Emphasis ours)

This court in Western Pacific Railroad Corporation v. Western Pacific Railroad Company, supra, made it crystal clear that the Courts of Appeal could delegate to the division of the court which initially heard the appeal, the determination of petitions for en banc rehearing. We note from the opinion of the Chief Justice, in support of our statement, these excerpts from the opinion:

> "A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing en banc to the three judges who are selected to hear the case.
>
> * * *
>
> "Consistent with the statute, the court may, as has been shown, adopt a practice whereby the majority of the full bench may determine whether there will be hearings or rehearings en banc, *or they may delegate the responsibility for the initiation of the en banc power to the divisions of the court.*
>
> * * *
>
> "If in the exercise of its discretion under Section 46 (c), a court denies litigants the privilege of reaching the ear of every Circuit judge on the en banc question, it is still no reason to deny them access to the few Circuit judges, who must act initially, and perhaps decisively on the matter for the others.

> "If the court chooses to abide by a procedure which entrusts the initiation of rehearings en banc to the division, then the court should give an opportunity to the division for appropriate consideration of that question in this case."

Again in the opinion of the court it is apparent beyond any question that the establishment of procedures in connection with petitions for rehearing en banc is purely an administrative function within the Court of Appeals. Each Circuit was given the right to establish its own procedure, within the limitations of the case; litigants were given "no statutory rights to compel each member of the court to give formal consideration to an application for a rehearing en banc," and Section 46 (c) did "not compel the court to adopt any particular procedure governing the exercise of the power; * * *."

Contrary to Appellant's views, stressed so strongly in its petition for rehearing of the order denying its initial petition for a writ of certiorari, that the practice of the Ninth Circuit permitting a mere division of the judges to determine petitions for rehearing en banc was in direct violation of Section 46 (c), Appellant now leans over to the other side of the fence and states, "appropriately, the exercise of the power might be delegated to a division of three judges." Upon the granting of Appellant's first petition for writ of certiorari, without limitation, all issues asserted by appellant therein

were presented to this court. Thereupon this court's mandate issued and the sole directive set forth therein was for further proceedings in the Court of Appeals on Appellant's petition for rehearing en banc in the light of the opinion of the Western Pacific case. Therefore, as pointed out above, the sole and only question now for consideration by this court on appellant's second petition for writ of certiorari is whether the Court of Appeals conformed to the mandate. Insofar as the case at bar is concerned, the Western Pacific case required only two things of the Court of Appeals: First, that the court of appeals, recognizing its power under Sec. 46 (c), establish the responsibility for determining rehearings en banc and, secondly, the action of the Court of Appeals on Appellant's petition for rehearing en banc pursuant to that predetermined responsibility. It readily appears that the Court of Appeals has fully complied with both of these elements. Rule 23 of that court was first amended to provide that a petition for rehearing en banc should be determined by the court as constituted in the original hearing. This delegation of authority was pursuant to the opinion in the Western Pacific case wherein this court stated that the original division could be empowered to pass upon en banc requests. Thereupon and pursuant to rule 23 as amended the division of the Court of Appeals again considered Appellant's petition for rehearing en banc and in its opinion denying the petition stated that "Appellant's petition for rehearing en banc has been considered by the Court" and that "the case should not

be reheard en banc or otherwise." It is therefore clearly apparent that the Court of Appeals has complied in every respect with the mandate of this court. Applicable to this case alone, it follows that no further discussion of other issues is warranted nor material, and consequently no other issue can serve as a ground for the granting of a second writ.

A further point is advanced by Appellant that the rule adopted by the Ninth Circuit is in conflict with the practice of the Third Circuit, and the Court of Appeals for the District of Columbia. We note that this point is not argued, and therefore should probably be ignored. We think this matter can be put to rest by stating that nowhere in the Western Pacific case does there appear any intimation that the procedure adopted by the various Circuits must coincide. To the contrary, within the framework laid down by the Western Pacific case, the individual Circuits are permitted to adopt their own procedures. The validity of our statement is corroborated by the language of the opinion in the Western Pacific case that the statute does not compel the court to adopt any particular procedure governing the exercise of the grant of power to the Court of Appeals to order rehearings:

> "Because Section 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised."

Appellant has tried again, in its usual reckless and intemperate manner, to put before this court the purported merits of its side of the case. As heretofore argued, we contend that the *only* questions before this court involve the proceedings subsequent to the issuance of the mandate to the Court of Appeals. Respondent's full and fair statement of facts, and Respondent's full presentation of the case prior to the issuance of the mandate is contained in his brief in opposition to Appellant's initial petition for writ of certiorari.

CONCLUSION

Since the jury's verdict in this case on September 30, 1949, this case has wound its tortuous way through a complete review of the record by the trial judge on motion for new trial, four separate proceedings before the Ninth Circuit, and is presently here on its *second* petition for writ of certiorari. Appellant's tactics would indicate with certainty that its basic and obvious strategy is to exhaust the resources and abilities of the Respondent, and by unfairly prolonging and dragging out this ancient litigation, effect a result favorable to it, which it has not found before the jury, the Court of Appeals, or the Supreme Court of the United States. Time and time again this court has pronounced that there must be an end to litigation. We seriously doubt that Appellant would even reluctantly admit that it has had its "day" in court, but the record cannot be

changed even by it. We respectfully submit that no reason whatever exists for the granting of the writ.

Dated: October 22, 1953.

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